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**In The
Supreme Court of the United States
October Term, 1978**

— 0 —
No. 78-160
— 0 —

ROY TIBBALS WILSON, CHARLES E. LAKIN,
FLORENCE LAKIN, HAROLD JACKSON, DARRELL
L., HAROLD, HAROLD M. AND LUEA SORENSON,
Petitioners,

R. G. P. INCORPORATED, OTIS PETERSON, TRAV-
ELERS INSURANCE COMPANY, STATE OF IOWA
AND STATE CONSERVATION COMMISSION OF
THE STATE OF IOWA,

Respondents (Petitioners on separate petitions),

VS.

OMAHA INDIAN TRIBE AND
UNITED STATES OF AMERICA,

Respondents.

— 0 —
**On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit**
— 0 —

BRIEF OF ABOVE PETITIONERS
— 0 —

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ROY TIBBALS WILSON, CHARLES E. LAKIN,
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On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF ABOVE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals, reported, *Omaha Indian Tribe v. Wilson*, 575 F. 2d 620, appears as Appendix A¹ to the Petition for Certiorari. The Findings of Fact and Conclusions of Law and the Memorandum Opin-

¹ With the petitions for certiorari petitioners filed a white covered volume containing Appendices A to F, inclusive, each separately page numbered. References to them will be made, e. g. (App. A17). References to the buff covered appendix filed herewith will be made, e. g. (A. 97).

ion of the District Court of the Northern District of Iowa are reported, *United States v. Wilson*, 433 F. Supp. 67 and 57, respectively. Copies appear as Appendices B and C to the Petition for Certiorari.

JURISDICTION

The Judgment of the Court of Appeals for the Eighth Circuit was entered on April 11, 1978. A timely petition for rehearing with suggestion that rehearing be in banc, was filed on April 25, 1978 and denied on May 2, 1978. The petitions for certiorari were filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 25.

§ 194. *Trial of right of property; burden of proof*

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership. R. S. § 2126.

§ 194, supra, was § 22 of an act to regulate trade and intercourse with the Indian tribes, and to preserve peace

on the frontiers, approved June 30, 1834, 4 Stat. 729, printed in full (A. 190) and §§ 12, 16 and 22 also printed (App. E3).

Other statutory provisions referred to herein as helpful in interpreting § 194 are included in Appendix E to the Petition for Certiorari. They are the following:

An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved March 30, 1802, sections 4 and 12, 2 Stat. 139, 141, 143. (App. E1)

An act to amend an act entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers", approved thirtieth of March, one thousand and eight hundred and two, approved May 6, 1822, Section 4, 3 Stat. 682, 683. (App. E2)

QUESTIONS PRESENTED FOR REVIEW

On November 13, 1978, this Court granted certiorari in No. 78-160, *Wilson et al. v. Omaha Indian Tribe, et al.*, limited to questions 2 and 3 presented by the Petition, which are the following:

2. Whether the Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable in this case.

3. Whether the Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in this case.

On the same date, this Court granted certiorari in No. 178-161, *Iowa, et al. v. Omaha Indian Tribe, et al.*,

limited to questions 1 and 4 presented by the petition; which are the following:

1. Whether the State of Iowa is "a white person", and the Omaha Indian Tribe is "an Indian" within the meaning of 25 U. S. C. § 194.

4. Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries.

STATEMENT OF THE CASE

This is a controversy over the ownership of 2900 acres of land on the east bank of the Missouri River in Monona County, Iowa, a few miles north of Onawa, Iowa. Plaintiffs in the United States District Court for the Northern District of Iowa, Respondents here, are the Omaha Indian Tribe and the United States as Trustee for the Tribe. They claim that this 2900 acres is part of the Omaha Indian Reservation which was established on the west or Nebraska side of the Missouri River pursuant to a Treaty of 1854, and that the 2900 acres came into existence on the east side as the result of avulsive actions of the River. The defendants in the District Court, Petitioners here, are the Iowa record titleholders. They claim the land as accretion to Iowa riparian land and their chains of title go back to patents from the Government to that riparian land. The exception is the State of Iowa which claims part of the land as accretions to Iowa's portion of the bed of the River. As between Petitioners Wilson, Lakin and R. G. P., Inc., on the one

hand and the State of Iowa on the other, any differences were resolved by quiet title actions and quitclaim deeds. The plat, Plate 1, App. F (T. Ex. 78, R. 22, 23)² shows the 2900 acres surrounded by the 1943 Iowa-Nebraska Boundary Compact line and the west shore meander line as surveyed by Barrett for the General Land Office in May of 1867. The 2900 acres will sometimes be referred to herein as the Barrett Survey area. North, east and south of the Barrett line is a line marking the Iowa high bank. The area surrounded by that high bank line and the Nebraska-Iowa Compact boundary line will sometimes herein be referred to as the Blackbird Bend area.

The easternmost portion of the Barrett survey area disappeared from the Nebraska side and appeared on the Iowa side of the River during the period of 1867 to 1890. Essentially all of the rest appeared on the Iowa side of the River during the period of 1906 to 1927. While much documentary evidence was obtained by discovery procedures from the files of the B. I. A. proving that the loss of land on the west side of the River was by erosion together with documentary evidence that the increase on the east side was contemporaneously considered to be accretion, there was no indication that anyone ever considered this 2900 on the east side of the river or any part of it to be part of the Omaha Reservation until some-

2 The trial court assigned numbers to plaintiffs' exhibits and letters to defendants' exhibits, double letters for second time through the alphabet, and letters with a number for the third or more times. T. stands for Tribe and the above reference is to Tribe's Exhibit 78, identified at Page 22 and received in evidence at Page 23 of the typewritten transcript of the record. G. Ex. stands for Government Exhibit, W. Ex. for Wilson Exhibit, etc.

time af'er 1962 when Edward L. Cline, an Omaha Indian, went to work for the Tribe with the official title of Economic Financial and Family Counselor to the Tribe (R. 5). In that capacity, he had access to plat books and apparently noticed that in 1867, the west shore meander of the River included the area under the sky now occupied by the 2900 acres. Cline concluded that that geographical area was part of the reservation and determined to get possession of it for the Tribe. Unsuccessful in getting action satisfactory to him from the Bureau of Indian Affairs, Cline, in 1973, 30 days before Easter, with a group of twenty or thirty members of the Omaha Tribe, occupied the Barrett survey area for thirty days, which occupancy was terminated by the arrest and removal of Cline and others from the land (Cline, R. 28A), and the Order of the Iowa District Court ordering Cline and his followers off the land (R. 41). But, Cline persisted and the B. I. A. provided funds for technical investigations (Corke, R. 73). William H. Veeder and Charles P. Corke, B. I. A. employees in Washington, were assigned to direct legal and technical studies (Corke, R. 73). The B. I. A. contracted with E. M. Clark and Associates, Surveyors, to assemble data, make maps, etc. (R. 74). Clark employed a geologist, Charles S. Robinson. They started their work on the case in June of 1973 (R. 793). In September of 1974, they submitted to the B. I. A. elaborate reports, Clark's 66 pages and 22 plates—maps (W. Ex. T, R. 528, 565, 573), and Robinson's 16 pages, plus 7 plates (W. Ex. V, R. 1170, 1172), which were rejected by Corke for the B. I. A., but which were offered in evidence by Petitioners because of their inconsistencies with the testimony of Clark and Robinson at the trial. Those reports

clearly show that the movements of the River in the Blackbird Bend area were essentially complete in the 1920's and before the United States Engineers first commenced work in that area, which was in 1936.

Cline became a member of the Tribal Council on February 18, 1975 (R. 31). He went to Washington with two other members of the Council and conferred with Corke, Veeder and Zuni, the Acting Commissioner of the B. I. A. He was encouraged to occupy once more the Barrett Survey area (R. 32). He, with other members of the Omaha Tribe, with approval by B. I. A. employees, again invaded the Barrett Survey area on April 2, 1975, took Jackson's (Wilson's tenant's) plow from him, seized his fuel tanks (later returned after intervention of the County Attorney), detained Jackson's hired man in the field (released after some negotiations), and drove out Jackson and Peterson, the tenants of Wilson and R. G. P., Inc., respectively, and their employees (R. 2338, 2339, 2341). Jackson and Peterson went into Iowa State Court and after notice of hearing obtained a temporary injunction against Cline and other members of the Omaha Tribe, enjoining them from coming on the Barrett Survey area and from interfering with the farming of said area by Jackson and Peterson and their agents and employees. A copy of that Order of May 16, 1975, is attached as Exhibit C (A. 117) to the Complaint of the Omaha Tribe (A. 100) against Jackson, Peterson and the District Court of Monona County, Iowa No. C75-4026, which Complaint was filed in the United States District Court for the Northern District of Iowa, Western Division on May 20, 1975. In it, the Tribe asked the Federal Court for a stay of the state court injunction and an injunction main-

taining the Tribe in possession of the land. The United States had filed, on May 19, 1975, its Complaint, Case No. C75-4024 (A. 61), against all of these Petitioners except the Sorensons asking for a preliminary injunction maintaining the Tribe in possession pending trial; for a judgment quieting title in the United States for the benefit of the Tribe to the Barrett Survey Area excepting certain lands not described which had been allotted to individual members of the Tribe and sold to nonmembers; and to enjoin Jackson and Peterson from prosecuting their state court suit or attempting to enforce the order entered therein.

Attached to the Tribe's complaint in 75-4026 as Exhibit "B", was a copy of the opinion of the Solicitor of the Department of Interior dated February 3, 1975, in which he stated (A. 114):

... The Army Corps of Engineers undertook a program in the 1940's to rechannelize the Missouri River to reduce flooding and to stabilize the location of the river. The rechannelization had the effect of cutting the Blackbird Bend oxbow off from the rest of the reservation. The oxbow became part of the eastern bank of the Missouri River for the first time. Not only had it shifted to Iowa's jurisdiction under the 1943 Compact, but geophysically, it became contiguous with the eastern bank due to the cessation of flow around the oxbow.

Although the foregoing statement did not bear the slightest resemblance to the facts (since the river movements were essentially complete in the 1920's, long before the U. S. Engineers started work in the area, nevertheless the Honorable Edward J. McManus, the District Judge who handled the preliminary phases of these cases, ac-

cepted it as fact. In his Order of June 5, 1975 (A. 119), he stated:

The plaintiff in each case contends that the Blackbird Bend area became located on the eastern bank through an avulsive change in the course of the Missouri River caused by channelization projects carried on by the Corps of Engineers during the 1940's (A. 120).

Judge McManus further stated in that Order:

The staff of the BIA has concluded, and the Solicitor of the Interior Department concurred in the conclusion, that approximately 3,190 acres in the Blackbird Bend region were still owned by the United States as part of the Reservation. Other than conclusory statements, defendants have produced no evidence to the contrary at this time (A. 123).

On that basis, he issued the preliminary injunction giving possession of the Barrett Survey Area to the Omaha Tribe pending trial. After defendants had time to employ an expert to make a study and a report, they attempted to obtain a hearing from Judge McManus on their application for a return of possession of the land pending trial, but their application and request for oral argument thereon were denied.

On October 6, 1975, the Omaha Tribe filed its complaint (A. 139) in Case No. C75-4067 against all of the Petitioners and numerous other defendants. It claims not only all of the Barrett Survey area, but also all of the rest of the Blackbird Bend area and land in two bends north of it, Monona Bend and Omaha Mission Bend, a total of 11,300 acres more or less. This area is shown shaded on the Plat (Ex. A to Tribe's Complaint, A. 148).

In their answers and counterclaims, in No. C75-4026 (A. 88) and in No. C75-4067 (A. 150), the defendants, State of Iowa and State of Iowa Conservation Commission, denied that either the Tribe or the United States as Trustee for the Tribe owned all or any of the land claimed by them in these cases, and alleged that the State of Iowa owns the bed of the Missouri River between the thalweg and the ordinary high water mark on the easterly side of the River and islands growing up out of that portion of the riverbed; that the land claimed by those petitioners is such land and additional land obtained by quitclaim deeds executed in settlement of boundaries; that land that may at one time have been within the geographical area of the Omaha Indian Reservation in an area now owned by the State of Iowa was eroded and washed away and ceased to exist by reason of action of the Missouri River and the rights of plaintiffs to said land were extinguished thereby. The State and its Conservation Commission further alleged abandonment and laches.

The other defendants in all three cases (A. 67-88, 126-138, 156-175) denied that plaintiffs owned all or any of the land claimed by them and alleged that when the Barrett Survey was made in 1867, land existed on the Nebraska side of the Missouri River that could be described as in the description of the Barrett Survey area but that all of it was eroded and washed away by the action of the Missouri River between 1867 and 1943, and ceased to exist at the described location, having been washed down the river; that new land was created between the years 1867 and 1943 by the process of accretion to the left, or Iowa bank, of the Missouri River, which accretions ex-

tended over all of the area of the earth's surface herein called the Barrett Survey area, and over all of the rest of the area herein called the Blackbird Bend area; that all of said accretion land upon its coming into existence became the property of the riparian owners on the Iowa bank of the Missouri River to whose land it had accreted; that by mesne conveyances from said riparian owners or from persons who obtained title from or against them, the defendants, Wilson, Lakin, R. G. P., Inc., and Sorenson, became and are now the owners in fee simple of the portions of the Barrett Survey area claimed by them respectively and described in their answers and counterclaims by Iowa Section, Township and Range numbers (See land ownership map, App. F). As additional defenses, the said defendants alleged adverse possession and estoppel by laches.

By order entered April 5, 1976 (A. 184), Judge McManus sustained plaintiffs' Motion for Partial Summary Judgment on defendants' defenses of adverse possession, laches, estoppel and abandonment. In the same order, he severed from Number C75-4067, all issues relating to lands, about 8,000 acres, which were not also within the subject res of C75-4024 and C75-4026 (Barrett Survey area), and all issues of damages. The three cases had previously been consolidated. So much of C75-4067 as was a suit to quiet title to the Barrett Survey area remained consolidated with 4024 and 4026.

The consolidated cases came on for trial on November 1, 1976, in Sioux City, Iowa, before Honorable Andrew W. Bogue, District Judge (of Rapid City, South Dakota, sitting by special assignment). The trial took 21 trial days, including a day devoted to inspection of the

subject land by the Court, finishing on December 6, 1976. The transcript of testimony is 3216 pages. There are over 150 exhibits. At the conclusion of the trial, Judge Bogue requested counsel for all parties to submit proposed Findings of Fact and Conclusions of Law by February 15, 1977.

The transcript of the testimony had been transcribed daily, and Judge Bogue was able to study the complete typed transcript of evidence and all of the exhibits after the trial along with the proposed Findings, Conclusions and Briefs submitted by counsel for all parties.

Judge Bogue prepared Findings of Fact and Conclusions of Law (App. B), a written Opinion (App. C), and a Decree (App. D). Of Judge Bogue's findings, the Court of Appeals said (App. A. 39): "In reviewing these findings, our task is not made easier by the District Court's verbatim adoption of defendants' analysis of the evidence and proposed Findings of Fact including defendants' credibility assessments of the witnesses." The 21-page Opinion is entirely the handiwork of Judge Bogue. Of the Conclusions of Law (App. B, 51-61), Judge Bogue adopted defendants' proposed Conclusions in part and rejected them in part. He made seven deletions from defendants' proposed Conclusions and five additions, some quite lengthy. Of the 11 pages, six full pages plus 53 lines on four other pages are Judge Bogue's language. The remainder, much less than half the space occupied by Judge Bogue's conclusions, were adopted from defendants' proposed Conclusions. Of the Findings of Fact (App. B, 2-51), there were 21 different parts of defendants' requested Findings which Judge Bogue omitted from 12 different pages of his Findings. There were 30

parts of 21 pages which Judge Bogue added to defendants' proposed Findings. These insertions of findings not requested by defendants amount to 184 printed lines, equivalent to six pages. The Court of Appeals implied that Judge Bogue adopted the defendants' proposed Findings mechanically (App. A, 23, Note 21), and that the Findings are not the product of the workings of the District Judge's mind. Actually, the extensive revisions the District Judge made in the defendants' proposed findings demonstrate that he was unwilling to adopt proposed findings unless satisfied that they were correct, not merely in general but also in detail.

The District Court Decree (App. D, 2) quieted title in defendants and dissolved the June 5, 1975 preliminary injunction which gave possession of the Barrett Survey area to the Omaha Indian Tribe.

On May 13, 1977, the Court of Appeals stayed the Order of the District Court and reinstated the injunction keeping the Tribe in possession of the Barrett Survey area. It also expedited the appeal and set the oral argument for June 13, 1977, with briefs to be filed by June 10, 1977. The case was argued as scheduled. Ten months later, on April 11, 1978, the 8th Circuit opinion was filed reversing the District Court and directing the entry of "judgment quieting title in the trust lands involved in this action in the United States as trustee, and the Omaha Indian Tribe" (App. A, 66). Motion for rehearing was denied on May 2, 1978 (A. 188).

Petitions for writs of certiorari by petitioners Wilson, Lakin, Jackson and Sorenson (No. 78-160) by petitioners, State of Iowa and State Conservation Commis-

sion of the State of Iowa (No. 78-161) and by R. G. P., Inc., Travelers Insurance Company and Otis Peterson (No. 78-162) were filed on July 28, 1978.

On November 13, 1978, this Court granted certiorari limited as hereinbefore stated (A. 189).

Since certiorari is limited to the question of the construction of § 194, and the question of whether federal or state common law of accretion and avulsion is controlling, we will attempt no extended review of the evidence but will round out this Statement of the Case with a very short statement of facts.

The eastern two and one-half miles of the Barrett Survey area peninsula or meander lobe was about one and one-quarter miles wide from north to south and it became wider further west. The eastern one and one-half miles was described by Barrett as a "low sandy point" and "subject to frequent inundations, entirely worthless for cultivation." (Barrett's field notes, T. Ex. 26d, 26e, R. 20, 22).

By 1879 when the Missouri River Commission mapped the Missouri in this area, (T. Ex. 29, R. 267, 285; W. Ex. U, R. 1143, 1145; App. A 11), the eastern mile of the south side and two miles of the north side of Barrett's meander lobe had disappeared, and the thalweg of the river was running through that area. Defendants' expert witnesses³

³ John F. Kennedy is professor in the Division of Energy Engineering at the University of Iowa and Director of the Iowa Institute of Hydrologic Research. He has a Ph.D. degree in Civil Engineering. From 1961 to 1966 he was assistant and then associate professor in charge of the Massachusetts In-

(Continued on next page)

were all of opinion that the Blackbird Bend meander having reached its limiting width, its thalweg gradually moved west completely eroding away the low sandy point before it and throwing up sandbars behind it in the slack water.

The trial court having seen and heard the witnesses and having inspected the land in controversy, accepted the

(Continued from previous page)

stitute of Technology hydrodynamics laboratory program in river mechanics and sediment transport. Most of his professional activities have been concerned with river mechanics, how rivers change their form, including the development of meanders. He has been a consultant to many foreign governments including the governments of Costa Rica, Venezuela and Germany with respect to problems of river training.

George R. Hallberg is chief of the Research Division of the Iowa Geological Survey and adjunct professor of geology at the University of Iowa and at Iowa State University. He has a Ph.D. in Geology for which his specialization was quaternary geology which is a study of surficial unconsolidated materials and land forms that relate to them and the processes by which they are formed, including movements by river systems. He had special training in hydrology and soils. Pursuant to invitation he has lectured at several national meetings of national scientific organizations. He directs and coordinates geological investigations under the Iowa Co-operative Soil Survey Program which includes mapping the soils of the Missouri River bottom lands and the subsurface sediments and to establish their nature in relationship to land forms and to the movements of the river, and has also worked with the Mississippi River and its tributaries.

Raymond L. Huber is a civil engineer employed by the U. S. Corps of Engineers from 1926 until his retirement in 1963. From 1936-1963 he was in charge of the design work of stabilizing the Missouri River channel throughout the entire area of the Omaha District which included the Missouri River from Rulo, Nebraska, to its source at Three Forks, Montana. For ten years he served as a member of the committee of the American Society of Civil Engineers engaged in the study of the meandering of alluvial rivers. Since his retirement he has served as a consultant on river stabilization.

opinions of the Petitioners' experts. The Court of Appeals, however, said that the trial court's conclusion was clearly erroneous; that the evidence was speculative and conjectural, and that neither side proved either avulsion or accretion (App. A55).

In 1894 the area under the sky formerly occupied by the east end of the Barrett survey peninsula was surveyed as accretion land by the county surveyor of Monona County, Iowa and apportioned to the Iowa riparian owners accordingly. (W. Ex. X3, R. 1779, 1784). There is no record of any contemporary suggestion that there had been any avulsion in that area.

The second half of this case involves the southward migration of the meander point on the Iowa side immediately north of the Barrett Survey peninsula and the disappearance of the rest of the Barrett Survey area from the Nebraska side of the river between 1906 and 1927.

The Petitioners' experts were of opinion that between 1906 and 1923 the thalweg gradually eroded its way southward and the riverbed behind it became filled by deposition; that the land lying east and north of the 1923 river is all accretion land added by deposition to the Iowa high bank; that all of the land lying within the area formerly occupied by the Barrett meander lobe is likewise accretion to the Iowa northern or eastern high bank. The trial court agreed.

As with the evidence with respect to the movement of the river between 1867 and 1879, the Eighth Circuit found the evidence with respect to the movement of the river between 1906 and 1923 to be speculative and conjectural (App. A62, 65), and accordingly that it was clearly erro-

neous for the District Court to decide the matter in favor of Petitioners because Petitioners had the risk of non-persuasion by reason of § 194.

The Eighth Circuit's conclusion that petitioners did not sustain their burden of proof under § 194 was influenced by its application of its version of the federal common law of accretion-avulsion—that there may be an avulsion with no identifiable fast land left in place (App. A. 42); that an avulsion may occur “within the bed of a stream” (App. A38) i. e. over or around a sand bar or piece of shore, without the river abandoning its old bed and seeking a new one. In announcing this theory as federal law, the Eighth Circuit rejected the standard definition of avulsion and accretion as reflected in 93 C. J. S. 750, 751, *Waters*, Sec. 76, derived from *Nebraska v. Iowa*, 143 U. S. 359, 36 L. Ed. 186, 12 S. Ct. 396 (1892) and other cases decided by this Court.

SUMMARY OF ARGUMENT

I.

The Eighth Circuit erroneously construed 25 U. S. Code § 194 to make it applicable in this case.

1. It construed “an Indian” to include an Indian tribe and the United States as trustee for a tribe, but everybody knows that it takes more than one Indian to make a tribe.

Congress in the Indian Non-Intercourse Act of 1834 (printed in full, A. 190), of which § 194 was § 22, used appropriate language to refer to Indian tribes.

The predecessor of the 1834 § 22 was § 4 of the 1822 Non-Intercourse Act which used the plural "Indians." The change to the singular in 1834 made it clear that individuals, not groups, were contemplated.

At the same time a corresponding change was made in § 12 which in its 1802 form (App. E2) made invalid any conveyance of and "from any Indian, or nation or tribe of Indians" unless made by treaty or convention. The words "Indian, or" were deleted in the 1834 Act. Thus, Congress made it clear that § 12 applied only to tribes and § 22 only to individual Indians, eliminating duplication of protective measures.

2. The Eighth Circuit construed "a white person" to mean any non-Indian, but everybody knows that not every non-Indian is a "white person."

Where Congress meant all non-Indians, it used appropriate language such as "any person other than an Indian."

Congress used the expression "a white person" in only two sections of the 1834 Act, § 22 (§ 194) and § 16. With respect to the latter, this Court held that "a white person" did not mean "not an Indian" and did not include a Negro. *U. S. v. Perryman*, 100 U. S. 235 (1880).

A purpose of federal Indian legislation was to protect Indians from the fraud and imposition of traders, who appear to have been white individuals, not other Indians, or Negroes, or corporations or states.

There is no evidence in this case that any of the defendants are "white persons"—members of the Caucasian race.

3. "Previous possession or ownership" as used in § 194 refers to the property in controversy and if that is accretion to Iowa riparian land its relation to the latter is that of fruit to the tree; it is not the same land as that which formerly occupied the same area under the sky but which was eroded and washed down the river. By assuming that the present land in the area is the same land that was there in 1867, the Eighth Circuit begged the question—assumed the ultimate fact to be proved by the Tribe—that the land in controversy arrived on the Iowa side of the river by the avulsion route—not as accretion. § 194 does not purport to relieve "the Indian" of the necessity of proving the facts which would make § 194 applicable. And as Judge Bogue pointed out, proof that the land in controversy is the same land as that owned or possessed by "the Indian" in 1867 would prove "the Indian's" case, and he would have no need to invoke § 194.

4. "Whenever" does not mean "always" and "whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership" does not mean that previous possession or ownership no matter how remote in time, or how changed the circumstances, and how many and strong the opposing presumptions and inferences, will always make out a presumption of title.

The presumption of continuance of condition or state of facts is one of variable weight depending on circumstances. With a time lapse of 50 to 100 years, its weight

is nil—the presumption does not exist. This is especially true in such a case as this where the circumstances are entirely different from those existing at the time of the supposed previous possession or ownership.

A presumption of title from previous possession or ownership could not arise because of other stronger opposing presumptions which include:

The presumption of ownership in petitioners from their record title, and from their conceded peaceful possession of forty years or more.

The presumption that the land being on the east side of the Missouri River was in Iowa before the 1943 Boundary Compact.

The presumption that public officers have properly discharged their official duties. No officer or employee of the Government, B. I. A. or other, reported any avulsion or asserted any claim to the land until 1975. On the other hand, it was surveyed as accretion land by surveyors for Monona County, some of it as early as 1894.

The strong presumption, founded on long experience and observation that a change in the thalweg of a river has occurred by reason of gradual erosion and accretion rather than by avulsion. Sometimes called the “rule of the live thalweg”, it requires “clear and convincing” evidence of a cutoff to satisfy the burden of persuasion of one claiming an avulsion.

5. “Burden of proof” as used in § 194 should be construed to mean burden of going forward with evidence—not risk of non-persuasion. Burden of proof in an ambiguous term—having two meanings. Construed as by

the Eighth Circuit as meaning risk of non-persuasion in § 194, in such a case as this it results in taking property from “the white person” and giving it to “the Indian”, making the statute an invidious racial discrimination which is unconstitutional. But, construing “burden of proof” in § 194 to mean burden of going forward with evidence would not have such a devastating effect on petitioners’ rights and would come closer to eliminating grave doubts as to the constitutionality of § 194.

II.

The Eighth Circuit erred in holding that federal and not state common law of accretion-avulsion is applicable in these cases.

The Eighth Circuit conceded that the basic rule is that the laws of the several states determine the ownership of the banks and shores of waterways, as of other real property, but it stated that there are two exceptions to that rule applicable in this case.

1. Its first exception is that where the navigable stream is an interstate boundary, the United States Supreme Court in the exercise of its original jurisdiction over suits between states has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary. The Court of Appeals argues that that exception should apply even though the Iowa-Nebraska Boundary Compact of 1943 fixed the state boundary, because a determination of this case might also incidentally determine where the boundary was in 1879 or 1890 or 1923 or 1927. But where the boundary as such was then is of no importance to any

of the parties to this litigation, and it provides no reason for displacing state property law with federal. In *Nebraska v. Iowa*, 406 U. S. 117 (1972), this Court construed the Compact as calling for application of state law and determined which state law was applicable. Blackbird Bend was not excepted from the Compact.

2. Secondly, the Eighth Circuit found a "compelling reason for applying federal law" in "the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated" (App. A. 15). But that special relationship is to protect the Tribe from loss of property by fraud and over-reaching on the part of others. That is the reason for the restraints on alienation of tribal land.

In its Indian laws, Congress made no provisions for protecting the tribes from the actions of the Missouri or other rivers. The Missouri is no respecter of persons, and a tribe, like any other riparian land owner stands to gain by accretion to its land and to lose by erosion of its land. The restrictions on alienation are not involved. State common law of accretion-avulsion is not discriminatory—it applies to all alike, Indian and non-Indian. In this case the Eighth Circuit version of federal law is more advantageous to the tribe. In another case the reverse may be true. The fact that the United States asserts a claim and is adversely affected by the application of state law does not prevent state law from applying unless state law comes into direct conflict with federal policy. But no federal policy with respect to riparian rights of tribes appears.

One reason why it is important to apply state law with respect to real property is to maintain uniformity

in the law in the state. This case, as the Court of Appeals has decided it, would be a striking example of non-uniformity with a crazy quilt pattern of forty-acre tracts of supposedly Indian trust lands where federal law is to be applied and other forty-acre tracts occupying areas where fee patented land once existed and where state law is to be applied.

No conflict between federal policy and state law exists here and state law should be the rule of decision.

ARGUMENT

Introduction

The District Court found that so much of the Barrett Survey area of 1867 as lay east of the 1879 thalweg had by 1879 been completely eroded away and washed down the river, and that in its place new land was added by deposition of alluvium—accretion to the Iowa riparian land (App. B, 28). Likewise as to the movement of the river between 1879 and 1923 the District Court found that after moving to the northerly high bank the river made a southern migration through the Blackbird Bend area by erosion on the Nebraska side and deposition on the Iowa side, which deposition was accretion to the northerly and easterly Iowa high banks (App. B, 44, 45), and further found that there was no evidence of any avulsions between 1923 and 1940 and that all of the land formed to the east of the Missouri River in the Blackbird Bend area as its channel was located in 1940 was accretion to the Iowa riparian land (App. B, 47).

As to burden of proof, the District Court said (App. C, 20):

... Plaintiffs have the burden of persuasion as to facts which establish their title; (2) similarly, Defendants bear the burden of persuasion on their counterclaim to quiet title; (3) failure of either of the two groups of claimants to sustain its burden of proof does not, standing alone, entitle the other side to relief. This Court wishes to state, however, that, after thorough and careful review of the evidence, it is satisfied that the findings of fact are supported by a preponderance of the evidence and would not be altered by any different allocation of the burden of persuasion.

The Court of Appeals disagreed. It placed the burden of persuasion on the defendants because of § 194 and said:

We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194 (App. A, 62). Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194. (App. A, 65).

In coming to that conclusion, it said:

Although it is possible that the land represented by bar C may have completely eroded, ... the record is insufficient to prove what actually occurred. (App. A, 44).

None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstances shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion (App. A49).

We conclude on the basis of an overall review of the record that it is entirely speculative to determine

when or how the thalweg moved to the position shown on the 1923 map (App. A65).

These established facts do not prove that either accretion or avulsion caused the river's movement (App. A62).

In coming to its conclusion, the Eighth Circuit was obviously influenced by its impression that there are important differences between the federal common law of accretion and avulsion and state common law on that subject. It seems to concede that under state law proof of avulsion requires a showing of identifiable land in place which has been severed from one bank of the river and become attached to the other; and also that state law does not recognize as an avulsion a movement of the thalweg within the bed of the stream, but requires that the river abandon its old bed and seek a new one. The Court of Appeals said (App. A13): "We hold that the governing principles of federal law vary significantly with the trial court's construction of state law and that the court erred in failing to apply that federal law." And with regard to what it considered the federal law of accretion and avulsion to be, the Court of Appeals said (App. A38, 39):

"... plaintiffs claim that a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. ... It was error for the trial court to reject the plaintiffs' legal theory. ..."

So the Court of Appeals rejected the findings of the District Court on the theory that the evidence (lay witness, map, documentary of contemporary observation, and expert opinion) was, because of § 194, not sufficient to support those findings that the river as it moved eroded away all the bars, shore and fast land before it and deposited accretion to the Iowa riparian land behind it; and the Court of Appeals applied its version of federal law to hold that defendants did not sustain their burden of proof because in its opinion the defendants had not satisfactorily disproved "the possibility" (App. A44) that Bar C of 1879 was a remnant of the 1867 Barrett low sandy point [shoreland] or that land on the Iowa side of the river in 1923 was previously shore of the Nebraska side because "this sandy area would not reveal any conspicuous identifiable features." (App. A63). In other words, the Court of Appeals held that defendants failed to prove that there had been no sudden perceptible movement of the thalweg over or around sand bars or shoreland which constituted parts of the bed of the river on the Nebraska side of the 1867 thalweg.

I.

The Eighth Circuit erroneously construed Title 25 U. S. Code § 194 to make it applicable to this case.

(1) The Eighth Circuit erred in holding that the words "an Indian" in § 194 include an Indian Tribe and the United States as trustee for a tribe.

The Eighth Circuit gave no real consideration to the above point. It discussed § 194 in six pages (App. A20-

25) and concluded that it cast the risk of non-persuasion on the defendants, which necessarily meant that it construed "an Indian" as used in the section to mean an Indian Tribe and the United States as trustee for a tribe. The Eighth Circuit obviously assumed that Congress in adopting the Indian Nonintercourse Act of 1934 was not using words in their ordinary commonly accepted meanings and that Congress did not know how to express itself with precision. The contrary clearly appears when the entire statute is examined.

25 U. S. Code § 194 is § 22 of "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30, 1834, 4 Stat. 729 (A. 190-204). Congress was quite capable of finding appropriate language to refer to Indians without including tribes, to refer to tribes without including individual Indians, and to refer to both at the same time. In the thirty sections of that statute Congress used the words, "Indian" or "Indians" numerous times often prefixed by "any". But it also used the expressions "the Indian tribes" or "any Indian tribe" or "any Indian nation or tribe of Indians" (Sections 2, 3, 19, 29, 12, 17) where the section was to be applicable to the tribes or nations rather than to individual Indians. And where the section was to apply both to the tribes and individual Indians, it used expressions such as "any Indian or Indian tribe" (Sec. 9) or "any Indian nation, tribe, chief or individual" (Secs. 13, 14, 15). Had Congress intended § 194 to apply to tribes and to the United States as trustee for tribes it would have used one of the latter expressions in place of "an Indian".

Furthermore, it should be noted that the ancestor of § 194 first appeared in the 1822 Act as § 4 (App. E2) and used the plural "Indians"—"in which Indians shall be a party on one side and white persons on the other." This was changed to the singular in the 1834 Act (§ 22, App. E3, 4)—"an Indian . . . a white person." The change from plural to singular made it clear that individuals—not groups—were contemplated.

The Solicitor General's brief in opposition to the petitions for certiorari at p. 11, suggests that the change from plural to singular was to make the syntax of § 194 consistent. That could have been accomplished by changing the latter part from singular to plural but instead Congress changed the first part from plural to singular.

A reason for the change from plural to singular appears to be the change in § 12 of the "Act to regulate trade and intercourse with the Indian tribes" etc. In its 1802 form (App. E2), it made invalid any conveyance of land "from any *Indian, or* nation or tribe of Indians" unless made by treaty or convention. (Emphasis ours.) The 1834 revision eliminated "Indian, or" from § 12 (App. E3). Thus the 1834 changes made it clear that the protection of § 12 applied only to Indian tribes and nations, not to individual Indians and protection of § 22 (§ 194) applied only to individual Indians, not to nations and tribes, thus eliminating duplication of such protective measures.

Surely Congress would be hard pressed to find any reason to give an Indian tribe the burden of proof advantage § 194 purports to give to "the Indian." The Indian tribes have rightly or wrongly been given the advantage of exemption from state statutes of limitations.

They are given the additional advantage of unlimited financial support by the Federal Government for their litigation.⁴ It is certainly understandable that Congress would not add to those preferences a tribal burden of proof advantage.

(2) The Eighth Circuit erred in holding that the words "a white person" in § 194 means all non-Indians—states, corporations and individuals whose race or color is not shown (App. A25).

The sovereign State of Iowa is not a white person. It is not even a person. In *United States v. United Mine Workers of America*, 330 U. S. 258, 275, 91 L. Ed. 884, 67 S. Ct. 677 (1947) the Court said:

The Act does not define "persons". The common usage of that term does not include the sovereign, and statutes employing it will ordinarily not be construed to do so. Congress made express provisions, Rev. Stat. § 1, 1 USCA &1, 2 FCA title 1, § 1, for the term to extend to partnerships and corporations, and in § 13 of the Act itself for it to extend to associations. The absence of any comparable provision extending the term to sovereign governments implies that Congress did not desire the term to extend to them.

⁴ The record shows that the B. I. A. paid Elmer Clark, its investigator-surveyor, and V. T. N. Colorado, Inc., the successor to Clark's surveying business, for their work and that of Charles Robinson, a geologist, and his associates, in preparation of these cases for trial, more than \$250,000.00 (R. 661). In addition to that, they were paid for their attendance and testimony at the trial. The B. I. A. paid Raul McQuivey, a hydrologist, for his preparation for trial and testimony, \$75,000.00 (R. 1655). Services of Veeder and Corke as B. I. A. employees supervising the investigation were supplied the Tribe by the B. I. A. as were fees for counsel for the Tribe.

R. G. P., Inc. and Travelers Insurance Company are corporations and as such they may be persons but they are not white persons. White persons have to be flesh and blood people—human beings. The individual petitioners could be white persons. But the tribe and the United States apparently did not think enough of their § 194 argument to take the trouble to prove that any of the individual petitioners were white.

The Eighth Circuit, without really addressing the issue, construes “a white person” to mean any non-Indian (App. A25). Here again a look at the entire 1834 Act makes it apparent that Congress would not have used the expression “a white person” had it meant any non-Indian. In Sections 4, 7 and 8, it used the words “any person other than an Indian” showing that it was quite capable of expressing the idea without ambiguity. When it meant to include Indians and non-Indians it said “any person whatever” (Sec. 21), “any person or persons whatever” (Sec. 14) “any person”, “all persons”, or “every person” numerous times. For more restrictive description expressions used were “any citizen or other person” (Secs. 13, 14, 15), “any citizen or inhabitant of the United States” (Sec. 17), “a foreigner” (Sec. 6), “persons except citizens of the United States” (Sec. 5) and “any white person or Indian” (Sec. 20). In only two sections was the expression “a white person” used—Section 22 (§ 194) and Section 16. The same contention that the statutory language “a white person” should be construed to mean a non-Indian was made many years ago with respect to § 16. Section 16 provided that when a white person was convicted of a crime committed in Indian country in which the property of a friendly Indian was taken or destroyed,

the person so convicted should be sentenced to pay the friendly Indian double the value of the property, and if the offender was unable to pay at least the value, the government should pay the amount by which the offender’s payment fell short. In *United States v. Perryman*, 100 U. S. 235, 25 L. Ed. 645 (1880), suit was brought by a friendly Indian against the United States for the value of twenty-three head of beef cattle stolen from him by a Negro who was duly convicted of the theft. This Court held that the United States was not liable. The Court said:

It is contended, however, that the term “white person”, as here used, means no more than “not an Indian”; in other words, that the intention of Congress was to make the United States liable in the way indicated for all injuries to the property of friendly Indians by persons engaged in crime within the Indian Territory who were not themselves Indians. Such, we think, is not the true construction of the statute.

The Court pointed out that the words “a white person” were substituted for “any such citizen or other person” used in previous statutes (§ 4, Act of 1802, App. E1) and that if Congress had wanted liability of the United States to arise by reason of theft by Negroes it could have continued to use that former language. Likewise with respect to § 22 (§ 194). If Congress had meant non-Indians it could have said so, or used the language of the former statutes or of other sections of the 1834 Act referred to above.

Sections 16 and 22 (§ 194) are similar in several respects. Both refer to Indian in the singular—“an Indian” and “the Indian” (Sec. 22) and “any friendly Indian” and “such friendly Indian” (Sec. 16). Both refer

to "a white person". Both are designed to provide a benefit or advantage to the Indian, Section 16 where the white person committed a criminal offense with respect to the Indian's property, and Section 22 when there is a trial about the right of property regardless of whether or not a criminal offense was involved. Some of the background of § 194 was a problem with respect to the Indian traders. In the Report of the House of Representatives Committee on Indian Affairs, Rep. No. 474, dated May 20, 1834, reporting the bill which became the statute above referred to, it was stated (at p. 11):

"The Indian trade, as heretofore, will continue to be carried on by licensed traders. The Indians do not meet the traders on equal terms and no doubt have much reason to complain of fraud and imposition."

The traders no doubt were white persons and when they were guilty of fraud and imposition their victims were individual Indians, not tribes.

Congress used the same words "a white person" in both §§ 16 and 22. It is highly improbable that the same words would have different meanings in the two sections of the same statute.

(3) The Eighth Circuit erred in holding that the words "previous possession or ownership" in § 194 includes possession or ownership of land or shore in the same area under the sky, i. e., same latitude and longitude, as the land in controversy regardless of whether or not the land or shore previously possessed on the west side of the river had been completely eroded away and replaced by new accretion land on the east side of the river.

The trial court held (App. C18-20) that § 194 was not applicable to this case because by its terms to make it applicable "the Indian" must first "make out a presumption of title in himself from the fact of previous ownership"; that to do that "the Indian" would have to show that the land on the Iowa side of the river now claimed by "the Indian" is the same land he owned on the Nebraska side in 1867, not new land added by accretion to the Iowa riparian land, and that if "the Indian" could prove that, he would not need § 194 because he would have proved his case without its help. The Eighth Circuit (App. A21) rejected that reasoning. It seems to hold that even if the 1867 land has been eroded away and replaced in the same area under the sky by accretion, it is the same land with a mere change of title. Here the Court of Appeals for the Eighth Circuit takes a position in direct conflict with the Court of Appeals for the Ninth Circuit which said in *Beaver v. United States*, 350 F. 2d 4 (C. A. 9, 1965):

The tract in question is in the same physical location as land patented to appellant's predecessor in title in 1914, and, at that time, located in Arizona. * * * If accreted land, it is *not* the land originally patented by the United States in 1914. * * * Appellants equate the precise land lost by erosion from the land on the Arizona side of the river with the precise land gained by accretion on the California side. There is not "physical identity" between the two areas of land, even though each is described as within the same Section 4, Township 9 South, Range 22 East. San Bernardino Meridian.

The rationale for the above is stated by this Court in *County of St. Clair v. Lovington*, 90 U. S. 46, 23 L. Ed. 59 (1874) as follows:

The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase.

If accretion, this land now on the Iowa side of the river is not the same land which once existed on the Nebraska side, transferred from the Omaha Tribe to the Iowa riparian owners by conveyance executed by the Missouri River as attorney-in-fact for the Tribe. On the contrary, it is an increase in the land of the Iowa riparian owners whose patents from the Government carried with them a vested right to such future increase. Defendants' titles descend to them from these riparian owners through mesne conveyances. Defendants bought the fruit from the riparian owners' trees, the increase from their flocks.

The Eighth Circuit says that the District Court presumes "that the reservation land has in fact been destroyed." Actually the Eighth Circuit presumed that it has not been destroyed, a presumption which is contrary to other presumptions or strong inferences favoring Petitioners which we shall presently describe.

In summary on this point, the Eighth Circuit (Step 1) assumed that the Barrett Survey area of 1876 was the same land and shore which was in the possession or ownership of the Omaha Tribe in 1867; from that "fact of previous possession or ownership" so assumed the Eighth Circuit concluded (step 2) that "the Indian" made out "a presumption of [present] title" in himself; from that presumption the Eighth Circuit concluded (step 3) that § 194 placed the burden of proof (which the Eighth Cir-

cuit says means the risk of non-persuasion) on the defendants; the Eighth Circuit then finds (step 4) that the defendants failed to sustain their burden of proof and that therefore the Barrett Survey area was transferred to the Iowa side of the river by an avulsion or avulsions—which was what the Eighth Circuit assumed in the first place.

(4) The Eighth Circuit erred in construing the clause in § 194—"whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership" to mean that "the Indian" does make out a presumption of title in himself from the fact of previous possession or ownership regardless of how remote in time that possession or ownership, how changed the circumstances and how many and how strong the contrary presumptions and inferences.

The presumption of continuance of condition or state of facts is one of variable weight depending on circumstances. It is described in 29 Am. Jur. 2d 285, *Evidence*, § 237 as follows:

When the existence of a condition or state of facts is once established by proof, an inference or rebuttable presumption arises that the condition or state of facts continues to exist as before, until the contrary is shown. Such inference or presumption is not a rule of law to be applied in all cases, with or without reason, but rather it calls for the exercise of sound discretion by a trial judge according to the likelihood of the persistence of a condition or fact under the circumstances of the case at bar. In general, with the lapse of time such inference or presumption loses probative force. Accordingly, the only rule that can

be formulated as to when the inference or presumption of continuance will arise is the broad one calling for a discretionary determination in which the nature of the subject matter and the time interval must figure prominently.

And in 29 Am. Jur. 2d 287, *Evidence*, § 239 it is said:

Title to, or ownership of, property shown to have existed in a particular person, is presumed to continue to exist until such time as it appears from the evidence that such person was divested of it by his own act or by operation of law. The weight of such a presumption is affected by such factors as the *length of time that has elapsed*, the character of the property as salable, consumable, or perishable, and the character of the alleged owner as thrifty or extravagant. (Emphasis added.)

Among other cases cited as supporting the above excerpts is *Maggio v. Zietz*, 333 U. S. 56, 92 L. Ed. 476, 68 S. Ct. 401 (1948), where this Court vacated an order affirming a district court order finding an officer of a bankrupt corporation to be in contempt of court for failing to comply with an order requiring him to turn over certain property to the trustee in bankruptcy. This Court held that the courts below gave too much weight to the presumption of continued possession. This Court said (333 U. S. at p. 65):

Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason.

And (333 U. S. at p. 66):

Of course, the fact that a man at one time had a given item of property is a circumstance to be weighed

in determining whether he may properly be found to have it at a later date. But the inference from yesterday's possession is one thing, that permissible from possession twenty months ago quite another.

And we might add, pertinent to the case at bar—the inference permissible from last year's possession is one thing, that permissible from possession more than one hundred years ago (when the Barrett Survey area was last known to remain intact on the Nebraska side of the river), or from possession more than fifty years ago (when the last sliver of the Barrett Survey area previously remaining disappeared into the river) quite another.

But the lapse of time is not the only reason why “the Indian” does not “make out a presumption of title in himself from the fact of previous possession or ownership. The circumstances are entirely changed from those existing at the time of the supposed previous possession or ownership. The land in controversy is not identifiable as the same land existing in that location under the sky in 1867. It is in a different state. It is on the opposite side of a great river. It has been occupied, cleared, improved and farmed by defendants and their predecessors in title for more than forty years according to the Tribe's pleading—actually much longer.

Furthermore, the feeble presumption referred to could never exist because it is countered by other stronger presumptions.

(a) **The presumption of ownership which follows record title.** Petitioners are the record title holders. Their abstracts of title are in evidence (W. Ex. W, R. 1787, 1788; W. Ex. X, X1, X1A, R. 1789, 1790). Questions of title as between the State of Iowa and other principal peti-

tioners were settled by quiet title decrees (W. Ex. AA, BB, CC, R. 1793, 1794) and quitclaim deeds (Ia. Ex. M8, N8, R. 1954, 1958, A. 258). This presumption is stated in 29 Am. Jur. 2d 283, *Evidence*, § 234.

(b) **The presumption of ownership arising from possession.** It is conceded that the petitioners had peaceful possession of this property for more than forty years prior to the commencement of this litigation. This presumption is stated in 29 Am. Jur. 2d 283, *Evidence* § 234. In *Fletcher v. Fuller*, 140 U.S. 534, 30 L. Ed. 759 (1886), this Court said:

The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin.

* * *

It is not necessary therefore, in the case mentioned, for the jury, in order to presume a conveyance, to believe that a conveyance was in point of fact executed.

(c) **The presumption that the land, being on the east side of the Missouri River (before the 1943 Boundary Compact) was in Iowa.** In *Kitteridge v. Ritter*, 172 Ia. 55, 151 N. W. 1097 (1915), the Court said:

(1) The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa.

(d) **The presumption that public officers have faithfully performed their duties.** Had there been an avulsion it surely would have been the duty of the officer in charge of the Omaha Indian Agency to report it to the Commis-

sioner of Indian Affairs and also to assert a claim to the land in question within a reasonable time, not 50 or 95 years later. Since no such report was made and no such claim asserted, it may be inferred that there was no avulsion to report and no basis for any claim to be asserted. On the other hand, Monona County surveyors surveyed the land as accretion to Iowa riparian land, some of it as early as 1894 (W. Ex. X3, R. 1779, 1784).

In *United States v. Chemical Foundation*, 272 U.S. 1, 71 L. Ed. 131, 47 S. Ct. 1 (1926), this Court said:

The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.

(e) **The strong presumption, founded on long experience and observation, that a change in the thalweg of a river has occurred by reason of gradual erosion and accretion rather than avulsion.** In *Mississippi v. Arkansas*, 415 U.S. 289, 39 L. Ed. 2d 333, 94 S. Ct. 1046 (1974), in his dissenting opinion Mr. Justice Douglas quoted from the special master's report (415 U.S. 295, 296, 29 L. Ed. 2d 338):

The *burden of persuasion* was upon Arkansas. Initially Arkansas conceded that Mississippi (415 U.S. 2961) had met its initial burden, aided as it was by the presumption that the change in the thalweg of the river was the product of accretion. (Emphasis ours.)

The majority opinion states (415 U.S. 294, 39 L. Ed. 337):

We agree with the Special Master's evaluation of the evidence and conclude, as he did, that Arkansas did not sustain its burden of rebutting Mississippi's conceded *prima facie* case, a burden the Arkansas court

has described as "considerable." *Pannell v. Earls*, 252 Ark. 385, 388, 483 S. W. 2d 440, 442 (1972).

In the cited case the Supreme Court of Arkansas said:

When land lines are altered by the movement of a stream, the weight of authority, both state and federal, appears to recognize a *strong presumption, founded on long experience and observation*, that the movement occurs by gradual erosion and accretion rather than avulsion. *United States Gypsum Co. v. Reynolds*, 196 Miss. 644, 18 So. 2d 448 (1944); *Dartmouth College v. Rose*, 257 Iowa 533, 133 N. W. 2d 687 (1965); *Kitteridge v. Ritter*, 172 Iowa 55, 151 N. W. 1097; *Bone v. May*, 208 Iowa 1094, 225 N. W. 367. (Emphasis ours.)

Elsewhere called the "rule of the live thalweg" it requires "clear and convincing" evidence of a cutoff to satisfy the burden of persuasion of one claiming an avulsion. See p. 17 of Special Master's Report "in all things confirmed" by this Court in *Louisiana v. Mississippi*, 384 U. S. 24, 16 L. Ed. 2d 330, 86 S. Ct. 1250 (1966).

In view of the length of time elapsing since the Indians' "fact of previous possession or ownership", the striking change of circumstances, and the superior strength of the opposing presumptions and especially of the rule of the live thalweg, it was impossible for "the Indian" to "make out a presumption of title in himself from the fact of previous possession or ownership." And it was error for the Eighth Circuit to construe the language of the statute—"whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership" to mean that "the Indian" does make out a presumption of title in himself whenever he proves that he has had previous possession or ownership.

(5) The Eighth Circuit erred in construing the words in § 194 "burden of proof" to mean "risk of non-persuasion" instead of burden of going forward with evidence.

At this point we will refer to a canon of statutory construction stated in 16 Am. Jur. 348, *Constitutional Law* § 145, as follows:

It is an elementary principle that where the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other it would be valid, the court should adopt the construction which will uphold it, even though the construction which is adopted does not appear to be as natural as the other.

And in § 146:

The duty of the courts so to construe a statute as to save its constitutionality when it is reasonably susceptible of two constructions includes the duty of adopting a construction that will not subject it to a succession of doubts as to its constitutionality, for it is well settled that a statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubt upon that score.

In 29 Am. Jur. 2d 154, *Evidence* § 123, it is stated:

The term "burden of proof" has two distinct meanings. In its strict sense, the term denotes the duty of establishing the truth of a given proposition or issue by such a quantum of evidence as the law demands in the case in which the issue arises, whether civil or criminal. In a secondary sense the term "burden of proof" is used to designate the obligation resting upon a party to meet with evidence a prima facie case created against him—that is, the duty of proceeding

with evidence at the beginning, or at any subsequent stage, of the trial in order to make or meet a prima facie case. The burden of proof in this secondary sense means, in short, the necessity of going forward with the evidence, and it is sometimes expressed by the term "burden of evidence."

For the reasons stated in our petition for certiorari (No. 78-160, pp. 11-18), it appears that § 194 as construed and applied by the Eighth Circuit in this case is an invidious racial discrimination against the "white person" in favor of the "the Indian" and deprives "the white person" of his property without due process in violation of the Due Process Clause of the Fifth Amendment. To avoid what appears to be at least a grave doubt as to the constitutionality of § 194, it would appear that the more innocuous meaning of "burden of proof" should be chosen, construing those words to mean burden of going forward with evidence—not risk of non-persuasion.

II.

The Eighth Circuit erred in holding that federal and not state common law with regard to accretion and avulsion is applicable in these cases.

The Eighth Circuit devotes seven pages of its opinion (App. A13-20) to this subject captioned "III Choice of Law." First, it recognized "the basic rule that the laws of the several states determine the ownership of the banks and shores of waterways", reaffirmed in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U. S. 363, 50 L. Ed. 2d 550, 97 S. Ct. 582 (1977) But to that rule it found two exceptions which it deemed applicable in this case.

(1) The fact that the river originally and presumably until 1943 was the boundary between Iowa and Nebraska does not justify the application of federal common law of accretion-avulsion in this case at this time.

The Eighth Circuit based its first exception to the general rule on the following excerpt from the *Corvallis* case (App. A13):

If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

With respect to that, the Court of Appeals goes on to say (App. A14):

In this case any claim that the reservation's eastern boundary had changed would of necessity have concerned the interstate boundary between Iowa and Nebraska, at least until 1943, thereby invoking federal law since both boundaries were located at the thalweg of the Missouri River.⁵

⁵ It is not accurate to say that the boundary of the Reservation was located at the thalweg. The Treaty of 1854 did not describe the Reservation. It was later selected and located in the Blackbird Hills area (T. Ex. 7, R. 11,13,A.265). Its outside boundaries were first surveyed and described by the surveyor, Barnum, who described its eastern boundary as the Missouri River—not the center or middle or thalweg of the river (T. Ex. 8A, R. 13,14,A.269). See also, p. 3 of the Frizzell memo, Ex. B attached to and made a part of the Tribe's complaint in C 75-4026 (A. 109) which memo though absolutely misrepresenting some facts seems to accurately describe the eastern boundary of the reservation as the river, not the thalweg. Nebraska received title to the bed of the river west of the thalweg under the equal footing doctrine when it was admitted to the Union in February of 1867. Nebraska did not

(Continued on next page)

We may concede that if these cases had been litigated prior to 1943, they might have involved a determination of the boundary between Iowa and Nebraska. But they were not filed or tried before 1943 and they do not involve a determination of a boundary between states.

The Eighth Circuit continues (App. A15) with some confusing language about application of the Boundary Compact and concludes that:

"Since the issue concerns who held good title to the land in question prior to 1943, federal law must be applied."

That conclusion by no means follows from the rule that federal common law is applied "to determine the effect of a change in the bed of the stream on the boundary." A determination of the state boundary as of 1943 will have no effect on the present state boundary. Although certain determinations of land ownership may turn on the same facts as determinations of the state boundary as of prior to 1943, such as 1879 or 1923, neither Nebraska, Iowa or the United States, has any legal interest in the determination of the state boundary as of 1943. As a basis for application of federal common law of accretion-avulsion determination of state boundaries was eliminated by the Compact.

(Continued from previous page)

relinquish ownership of the bed of the river to the riparian owners (including the Omaha Tribe) until 1906, *Kinthead v. Turgeon*, 74 Neb. 573, 104 N. W. 1061 (1905); 74 Neb. 580, 109 N. W. 744 (1906). The low sandy point, east mile and a half of the Barrett Survey area, which disappeared between 1867 and 1879 (which plaintiffs claim was cut off and defendants say was eroded away) was shore, below the ordinary high water mark, part of the bed of the river then owned by the State of Nebraska.

To hold that determination of title to land along the river as the river existed before 1943 must be made under federal common law because such determination may incidentally, and as a mere matter of historical interest, locate the state boundary as it existed sometime before 1943, would be an unwarranted expansion of the rule that federal common law is applied "to determine the effect of a change in the bed of the stream on the [state] boundary."

The Eighth Circuit did not discuss *Nebraska v. Iowa*, 406 U. S. 117, 31 L. Ed. 2d 733, 92 S. Ct. 1379 (1972) which the District Court found very significant on this point (App. C 4, 5). The District Court opinion says:

"Thus, under the 1972 *Nebraska v. Iowa* decision, Nebraska law would provide the rule of decision for land disputes as to river changes occurring prior to 1943, and Iowa law would provide the rule of decision for changes occurring after that date."⁶

Neither the Compact⁷ nor the Act of Congress⁸ approving it made any exception for Blackbird Bend or the Omaha Indian Reservation.

⁶ The statement refers to land on the Iowa side of the 1943 Compact boundary, Footnote 4 of the *Nebraska v. Iowa* opinion, *supra*, mistakenly lists Blackbird Bend as an area formed since 1943. Since it was actually formed before 1943, Judge Bogue concluded that *Nebraska v. Iowa*, *supra*, construed the Compact to make Nebraska law the rule of decision for Blackbird Bend.

⁷ Iowa Code 1977, p. LXXIV; Iowa Acts 1943, C 306; Nebraska Laws 1943, C 130, R. R. S. Nebr. 1943, Vol. 2A, Appendix p. 915.

⁸ Act of July 12, 1943, 57 Stat. 494.

(2) The special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated do not justify applying federal common law of accretion and avulsion in this case.

In his opinion (App. C at p. 5), the district judge concluded that "the fact that the United States, as trustee for the Tribe, claims the land involved in this lawsuit does not make federal law controlling," citing *Mason v. United States*, 260 U. S. 545, 43 S. Ct. 200 (1923); *United States v. Little Lake Misere Land Company, Inc.*, 412 U. S. 580, 595, 93 S. Ct. 2389, 2398 (1973); *Wright*, 14 *Federal Practice and Procedure*, 141 N. 4 (1976); *Fontenelle v. Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb. 1969), aff'd 430 F. 2d 143 (8th Cir. 1970); *Herron v. Choctaw and Chickasaw Nations*, 228 F. 2d 830 (10th Cir. 1956); *Francis v. Francis*, 203 U. S. 233, 27 S. Ct. 129 (1906); and Rules of Decision Act, 25 U. S. C. § 1652.

The district judge pointed out that while it may be that the commerce clause would empower Congress to mandate the use of federal law in cases such as this, it has not done so; that nothing in the treaties which relate to the Omaha Tribe, or the "Documents of Selection" (T. Ex. 7, R12, 13, A.265), under which the Omaha Tribe selected its reservation lands, precludes the application of state law; that only the restraints against alienation familiar to Indian law create an exception to the general rule that state law controls the tenure, transfer, control and disposition of real property, citing *Sunderland v. United States*, 266 U. S. 226, 45 S. Ct. 64 (1924). The district judge concluded (App. C8):

This Court is unable to discern any federal policy broad or strong enough to supplant the strong local policy concerning title to land. This case should be governed by state law. Virtually all of the analogous cases have used state law. In short, this case should be governed by the choice of law principles laid down in *Nebraska v. Iowa*, 406 U. S. 117, 92 S. Ct. 1379 (1972).

The Eighth Circuit disagreed. It held that "because the Tribe's right asserted to Indian trust land arises under federal law, we hold that the governing law is federal law" (App. A20).

We submit that the rule established by the decisions of this Court is that the general rule that state law controls the determination of the incidents of ownership of real property will be applied "in the absence of any governing administrative ruling, statute, or dominating consideration of congressional policy to the contrary." *United States v. Oklahoma Gas & Electric Company*, 318 U. S. 206, 87 L. Ed. 716, 63 S. Ct. 534 (1943). That case involved the validity of a license to maintain electric power lines over allotted Indian lands. The United States argued that the license was invalid. The Court said "the interpretation suggested by the government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the over-reaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule as are others in this State. . . ." Thus, the Court recognized the policy of Congress to protect Indians "against their own improvidence or the over-reaching of others" but found that policy not in conflict with the application of state law under the circumstances

of the case, pointing out that the state law is not discriminatory.

Likewise, in the case at bar, the state law of accretion and avulsion applies equally to Indians and tribes and to all others, and it is not involved with any rule to protect Indians or Indian tribes from their own improvidence or the overreaching of others.

Unlike the case at bar, *Sunderland v. United States*, 266 U. S. 226, 69 L. Ed. 259, 45 S. Ct. 64 (1924), and *Oneida Indian Nation v. County of Oneida*, 414 U. S. 685, 39 L. Ed. 2d 90, 94 S. Ct. 771 (1974), were directly involved with the validity of the restrictions on alienation of Indian trust land. The Court in *Sunderland*, as reasons for enforcing the federal statutory restrictions on alienation of Indian land said (266 U. S. 233, 234):

Such power [restraint on alienation] rests upon the dependent character of the Indians, their recognized inability to safely conduct business affairs, and the peculiar duty of the Federal government to safeguard their interests and protect them against the greed of others and their own improvidence.

The basis for the *Sunderland* decision does not exist in the present case. No federal statute or federal policy designed to give Indian tribes preferential treatment by way of protecting tribal land from the ravages of the Missouri River exists. Thomas Ashley in the Fall of 1908 reported to the Commissioner of Indian Affairs that the river, where it turned to the east at the north end of Blackbird Bend had in the previous year migrated south about a mile (W. Ex. R, R. 535, 592), and that it had washed away over 400 acres of reservation bottom land, and that at the rate it was going, it would wash away an

additional 1,300 acres of allotted lands before the year 1914. He asked "if there is not some way to prevent this erosion by constructing riprap in the river above where it strikes this low land." He got no action from the Government. There was no policy to thwart the movements of the Missouri. The policy to protect Indians from fraud and over-reaching is not pertinent here since no transaction which would involve fraud or overreaching is involved.

The Eighth Circuit said (App. A17): "Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under the federal law." The right of the Iowa riparian landowners to their original land also arises under federal law which authorized the patents to them. The incidents of their ownership, including the right to accretion and the risk of loss by erosion are determined by state law. With that the Eighth Circuit agrees. But it thinks a different law should apply when an Indian tribe asserts a claim. We submit that the Eighth Circuit has furnished no valid reason for its rule.

The Court of Appeals seems to equate the destruction of Indian trust land by the Missouri River with its alienation by unauthorized conveyance by the tribe. The two actions are not comparable. When enacting the legislation providing for the restrictions on alienation, Congress did not have action by the Missouri River in mind. It did not say that no Indian trust land shall be washed away by the Missouri River without approval by treaty or act of Congress.

Where state law comes into direct conflict with federal policy, then federal law may be applied. *United States v. Little Lake Misere Land Co., Inc. et al.*, 412 U. S. 580,

37 L. Ed. 2d 187, 93 S. Ct. 2389 (1973). But even where the interest of the Federal Government may be directly opposed to application of state law, state law will be applied where the federal policy is an amorphous doctrine of national sovereignty, *United States v. Little Lake Misere Land Co., Inc. et al.*, *supra*, f. 10 at 412 U. S. 592, citing *United States v. Burnison*, 339 U. S. 87, 91 and 92, 94 L. Ed. 675, 70 S. Ct. 503 (1950), and *United States v. Fox*, 94 U. S. 315, 24 L. Ed. 192 (1877). *Burnison* and *Fox* upheld state statutes invalidating bequests and devises to the United States.

While the application of the Eighth Circuit's version of federal law is favorable to the tribe in this case, there is no indication that it would be favorable to the tribe in other claims the tribe might have. If the tribe claims other lands as accretion (instead of by avulsion as in the present case), state law would be more advantageous to the Tribe than the Eighth Circuit version of federal law. An illustration of such a situation is *Herron v. Choctaw and Chickasaw Nations*, 228 F.2d 830 (C. A. 10, 1956) where Oklahoma law which recognizes the doctrine of re-emergence, was applied, resulting in a judgment for the Indian tribe.

There is here no showing of significant conflict between federal policy and state law to justify application of federal law.

One reason why state real property law should be controlling is that application of state law will avoid the legal confusion sure to result if federal law and state law are permitted to reign in the same state, on the same river, in the same locality, simply because a federal interest is claimed by the United States.

Note this Court's recent decision in *California v. U. S.*, — U. S. —, 57 L. Ed. 2d 1018, 46 LW 4997 (July 3, 1978), which invoked the state's right to impose conditions on the appropriation of water for federal use. This Court recognized the "continued deference to state water law by Congress" [at p. 4999] and recognized that the federal policy was to avoid "the legal confusion that would arise if federal water law and state water law reigned side by side in the same locality." [at p. 5003]. From a case involving real property law, we take a similar excerpt:

Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear. *United States v. Oklahoma Gas & Electric Co.*, 318 U. S. 206, 211, 87 L. Ed. 716, 721, 63 S. Ct. 534 (1943).

An illustration of such legal confusion exists in this present case. The United States in its complaint in No. C 75-4024 (A. 61, 62) asked for a decree quieting title in it as trustee for the Tribe of the Barrett Survey area (2900 acres) but excluding land which was "allotted to individual members of the Tribe and sold to non-members." The memo incorporated in the Tribe's complaint in C 75-4026 also disclaimed the land patented to non-Indians (A. 112). By discovery procedure and by evidence introduced at the trial, it was determined that the above excluded land was 400 acres, that an additional approximately 265 acres was unquestionably fee patented, a total of 665 acres, and that an additional approximately

80 acres was fee patented under deeds of questionable validity. Counsel and the representative of the B. I. A. who testified at the trial, Mr. Corke, agreed that the fee patented lands were out of trust whether or not they had been sold to non-Indians (R. 94). See *Larkin v. Paugh*, 276 U. S. 431 (1928), and, *Dillon v. Antler Land Co. Wyola*, 507 F. 2d 940 (C. A. 9, 1974), cert. den. 421 U. S. 922. A map was introduced showing the location of the fee patented lands (T. Ex. 18A, R94, 111). A map showing their location appears at the end of this brief.

With respect to the fee patented land the Eighth Circuit said (App. A67, footnote 70):

The government excepted from its complaint any claim to approximately 400 acres of land within the Barrett Survey which may have been allotted to individual Indians and subsequently patented to non-Indians. Any current claims to those lands by the Tribe might be affected by issues of adverse possession and laches. We therefore remand to the district court those claims related to the land excepted from the government's complaint for a determination on the above mentioned issues.

Also, the Eighth Circuit said (App. A66, 67): "The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment quieting title in the *trust lands* involved in this action in the United States as trustee, and the Omaha Indian Tribe" (emphasis ours). Quieting title only in the "trust lands" leaves out the fee patented lands, and under the Eighth Circuit ruling, we have a crazy quilt of applicable law, the Eighth Circuit version of federal law of accretion-avulsion to be applied in the area where the trust land was last seen on the Nebraska side of the river and the

state law in the area formerly occupied by the fee patented land, with the result, apparently intended by the Eighth Circuit, that the area of the fee patented land goes to the petitioners and the area of the trust land goes to the Tribe.

Apparently under the Eighth Circuit ruling, title to land claimed by the Tribe as accretion, not as part of the original reservation, would also be governed by state law (see footnote 69, C. A. Opinion, App. A.65). Since much of the 8000 acres involved in this litigation not yet tried is claimed by the Tribe as having been added to the reservation by accretion and then transferred to the east side of the river by avulsions, there would be a great deal of confusion in the trial over the 8000 acres trying to sort out to which tracts state and to which tracts federal law must be applied.

The policy of avoiding such legal confusion by applying the basic rule that the laws of the several states determine the ownership of the banks and shores of waterways should be continued.

CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be reversed with directions to reinstate and affirm the judgment and decree of the United States District Court for the Northern District of Iowa quieting title to the Barrett Survey area land in defendants as their respective interests may appear.

Petitioners should be awarded their costs herein incurred.

Respectfully submitted,

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